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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

MARY MALOOF, Plaintiff and Respondent, v. WIRELESS WORLD, LLC, et al., Defendants and Appellants.	E071431 (Super.Ct.No. CIVDS1801965) OPINION

APPEAL from the Superior Court of San Bernardino County. John M. Pacheco, Judge. Affirmed.

Skane Wilcox, Elizabeth A. Skane and Joel P. Glaser; Klinedinst PC, G. Dale Britton and Thomas E. Daugherty, for Defendants and Appellants.

Leslie Glyer Law, Leslie Glyer; Capstone Law, Ryan H. Wu, John E. Stobart and Arnab Banerjee for Plaintiff and Respondent.

Defendants and appellants Wireless World, LLC (Wireless World) and Wireless Choice, Inc. (Wireless Choice) appeal the denial of their motion to compel arbitration against plaintiff and respondent Mary Maloof. The trial court found that appellants failed

to prove by a preponderance of the evidence that Maloof signed an arbitration agreement. The trial court also found that, even if Maloof did sign an arbitration agreement, it did not apply to Maloof's claim bringing a representative action for civil penalties under the Labor Code Private Attorneys General Act of 2004 (PAGA; Lab. Code, § 2698 et seq.). We affirm.

I. FACTUAL AND PROCEDURAL HISTORY

According to the complaint, appellants operate a chain of wireless retail stores. Appellants employed Maloof from 2012 to 2017, first as a retail sales associate and eventually as a store manager. Maloof was for a certain time misclassified as an exempt employee, and when she was later reclassified as a non-exempt or hourly employee, she did not receive pay for overtime work performed or other entitlements under the Labor Code. In January 2018, Maloof brought this representative action under the PAGA on behalf of herself, all other aggrieved employees, and the state.

Appellants moved to compel arbitration, arguing that Maloof signed an applicable arbitration agreement.[1] The arbitration agreement provided that "[e]xcept as otherwise required under applicable law, (1) Employee and Employer expressly intend and agree

[1] Wireless Choice was not a signatory to the arbitration agreement, and the parties disputed before the trial court whether Wireless Choice could enforce it. (See *Westra v. Marcus & Millichap Real Estate Investment Brokerage Co., Inc.* (2005) 129 Cal.App.4th 759, 763 ["Generally speaking, one must be a party to an arbitration agreement to be bound by it or invoke it."].) In its ruling, the trial court suggested that Wireless Choice might have standing to enforce the arbitration agreement but did not specifically rule as such, presumably given its conclusion that Maloof never signed the agreement and that the agreement was unenforceable in any event. Because we reach the same conclusions as the trial court, we assume, but do not decide, that Wireless Choice had standing to enforce the arbitration agreement.

that class action and representative action procedures shall not be asserted, nor will they apply, in any arbitration pursuant to this Policy/Agreement; (2) Employee and Employer agree that each will not assert class action or representative action claims against the other in arbitration or otherwise; and (3) each of Employee and Employer shall only submit their own, individual claims in arbitration and will not seek to represent the interests of any other person." Appellants also argued that although our Supreme Court in *Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal.4th 348 (*Iskanian*) held that waivers of the right to bring a PAGA claim are unenforceable, the case is no longer good law following the United States Supreme Court's ruling in *Epic Systems Corp. v. Lewis* (2018) __ U.S. __ [138 S.Ct. 1612, 200 L.Ed. 2d 889] (*Epic*). Appellants also argued that *Iskanian* does not prohibit a court from ordering a PAGA claim to arbitration.

In opposition, Maloof represented that she never entered into an arbitration agreement with appellants, that she was never required to, and that the signature on the purported agreement was not hers. Maloof also argued that, in any event, the arbitration agreement remained unenforceable under *Iskanian*, which remains good law.

After requesting additional briefing on whether Maloof signed the arbitration agreement, the trial court denied the motion, holding that defendants failed to satisfy their burden of demonstrating Maloof signed the arbitration agreement, and that it could not apply to a PAGA claim under *Iskanian* in any event.

II. ANALYSIS

A. *Whether Maloof Signed an Arbitration Agreement*

1. Applicable Law

"The principles governing petitions to compel arbitration are well established. Public policy favors contractual arbitration as a means of resolving disputes." (*Espejo v. Southern California Permanente Medical Group* (2016) 246 Cal.App.4th 1047, 1057.) "But that policy '"'does not extend to those who are not parties to an arbitration agreement, and a party cannot be compelled to arbitrate a dispute that he has not agreed to resolve by arbitration.'"'" (*Ibid.*)

Code of Civil Procedure section 1281.2 provides that "[o]n petition of a party to an arbitration agreement alleging the existence of a written agreement to arbitrate a controversy and that a party to the agreement refuses to arbitrate that controversy, the court shall order the petitioner and the respondent to arbitrate the controversy if it determines that an agreement to arbitrate the controversy exists . . . ."

"[W]hen a petition to compel arbitration is filed and accompanied by prima facie evidence of a written agreement to arbitrate the controversy, the court itself must determine whether the agreement exists and, if any defense to its enforcement is raised, whether it is enforceable. Because the existence of the agreement is a statutory prerequisite to granting the petition, the petitioner bears the burden of proving its existence by a preponderance of the evidence." (*Rosenthal v. Great Western Fin. Securities Corp.* (1996) 14 Cal.4th 394, 413.) In deciding the petition, "the trial court sits as a trier of fact, weighing all the affidavits, declarations, and other documentary

evidence, as well as oral testimony received at the court's discretion, to reach a final determination." (*Engalla v. Permanente Medical Group, Inc.* (1997) 15 Cal.4th 951, 972.)

A defendant may meet its "*initial* burden to show an agreement to arbitrate by attaching a copy of the arbitration agreement purportedly bearing the opposing party's signature." (*Espejo v. Southern California Permanente Medical Group, supra,* 246 Cal.App.4th at p. 1060.) If the plaintiff challenges the validity of that signature in opposition, the defendant is "then required to establish by a preponderance of the evidence that the signature was authentic." (*Ibid.*)

"'There is no uniform standard of review for evaluating an order denying a motion to compel arbitration.'" (*Carlson v. Home Team Pest Defense, Inc.* (2015) 239 Cal.App.4th 619, 630.) Generally, "[i]f the court's order is based on a decision of fact, then we adopt a substantial evidence standard." (*Ibid.*) However, where, as here, "'the issue on appeal turns on a failure of proof . . . the question for a reviewing court becomes whether the evidence compels a finding in favor of the appellant as a matter of law.'" (*Sonic Manufacturing Technologies, Inc. v. AAE Systems, Inc.* (2011) 196 Cal.App.4th 456, 466; see also *id.* at p. 465 [where trier of fact concludes that the party with the burden of proof fails to carry the burden, it is "misleading" to characterize the standard of review as one of substantial evidence].) "'Specifically, the question becomes whether the appellant's evidence was (1) "uncontradicted and unimpeached" and (2) "of such a character and weight as to leave no room for a judicial determination that it was insufficient to support a finding."'" (*Id.* at p. 466.) "[U]nless the trial court makes

specific findings of fact in favor of the losing [party], we presume the trial court found [that party's] evidence lacks sufficient weight and credibility to carry the burden of proof." (*Bookout v. State of California ex rel. Dept. of Transportation* (2010) 186 Cal.App.4th 1478, 1486.)

2. *Discussion*

Appellants met their initial burden by attaching the arbitration agreement, which purportedly bears Maloof's signature. (See *Espejo v. Southern California Permanente Medical Group*, *supra*, 246 Cal.App.4th at p. 1060.) Because Maloof represented that she never entered into an arbitration agreement with appellants, however, appellants then had "the burden of proving by a preponderance of the evidence that the . . . signature was authentic." (*Ruiz v. Moss Bros. Auto Group, Inc.* (2014) 232 Cal.App.4th 836, 846.) The trial court found that appellants did not carry that burden, and their evidence does not compel a contrary finding here.

As part of their moving papers, appellants submitted a declaration from Kristian Allos, Wireless World's CEO. The declaration represented that an attachment was a "true and accurate copy of the Wireless World Arbitration Agreement signed by Ms. Maloof." Allos did not elaborate as to how he knew Maloof signed an arbitration agreement. Later, as part of their sur-reply filed at the trial court's request, appellants submitted a supplemental declaration from Allos, who represented that the purported

signature on the arbitration agreement "matches and/or is extremely similar to" her signature on several other documents.[2]

Also as part of their sur-reply, appellants submitted a declaration from Priscilla Pitpit, a human resources manager for Wireless World. Pitpit represented that "Wireless World's practice and procedure was for the District Manager to obtain the signed agreements and acknowledgments from Wireless World employees and then forward those documents to Wireless World's Human Resources Department so that the signed documents could be placed in the employees' personnel files." Pitpit represented that she followed the procedure with respect to Maloof's purported arbitration agreement and stated: "I am informed that the . . . arbitration agreement that Mary Maloof signed . . . is the same agreement I received from her District Manager and which was placed in her personnel file."

Appellants' evidence does not compel the conclusion that Maloof signed the arbitration agreement. Allos and Pitpit do not state, for instance, that they were present when Maloof purportedly signed the arbitration agreement, and neither demonstrated they have personal knowledge that Maloof signed it. Instead, Allos relies on an inference based on a visual comparison of signatures, and Pitpit relies on what someone else "informed" her. A fact finder is not compelled to accept something as true or genuine simply because it can. (See *Bookout v. State of California ex rel. Dept. of Transportation*, *supra*, 186 Cal.App.4th at p. 1487 ["We apply the usual rule on appeal

[2] Maloof verified that the signatures Allos used for comparison were hers.

that the trier of fact is not required to believe the testimony of any witness, even if uncontradicted."].) Accordingly, the trial court was entitled to find appellants' evidence here insufficiently persuasive to carry their burden.

Appellants argue that Maloof's representation that she was not required to sign an arbitration agreement because she was an "established employee"—in other words, that she was grandfathered out of the requirement when appellants began requiring employees to sign arbitration agreements—is contradicted by allegations in her complaint that appellants "dictated policies at the corporate level and implemented them company-wide, regardless of their employees' assigned locations or positions." In other words, appellants argue that the allegations act as a judicial admission that she was required to sign documents other employees were required to sign.[3] This argument, however, fails to demonstrate that the trial court erred; even if Maloof were required to sign an arbitration agreement because other employees were also required to, appellants' evidence does not compel the conclusion that she actually did sign one.

Appellants also argue that the trial court "simply ignored" their evidence, such as Pitpit's declaration and Allos's supplemental declaration. Although the trial court's order did not specifically mention these items, these omissions do not demonstrate error, as we

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[3] Maloof observes that this argument was not raised before the trial court. Because this involves a legal question determinable from uncontroverted facts, however, it may be raised for the first time on appeal. (*Redevelopment Agency v. City of Berkeley* (1978) 80 Cal.App.3d 158, 167 [theory may be raised for the first time on appeal where it "involves only a legal question determinable from facts which not only are uncontroverted in the record, but which could not be altered by the presentation of additional evidence"].)

nevertheless "presume the trial court found [appellants'] evidence lacks sufficient weight and credibility to carry the burden of proof." (*Bookout v. State of California ex rel. Dept. of Transportation, supra,* 186 Cal.App.4th at p. 1486.)

Finally, we do not agree with appellants that the failure of the trial court to conduct an evidentiary hearing was an abuse of discretion. Even though our Supreme Court has stated that the "better course" would be to hold an evidentiary hearing when the enforceability of an arbitration clause depends "upon which of two sharply conflicting factual accounts is to be believed" (*Rosenthal v. Great Western Fin. Securities Corp., supra,* 14 Cal.4th. at p. 414), it has also rejected the notion that a trial court's failure to do so is necessarily an abuse of discretion. (*Ibid.* ["GWFSC nevertheless maintains that when the declarations and documentary evidence present a material factual dispute as to the existence or enforceability of the arbitration agreement, 'the trial court must proceed to a summary bench trial' of the issues. In cases of this sort, GWFSC insists, 'the failure to resolve a material issue of fact by an evidentiary hearing is an abuse of discretion.' We decline to embrace the broad rule proposed by GWFSC. There is simply no authority for the proposition that a trial court necessarily abuses its discretion, in a motion proceeding, by resolving evidentiary conflicts without hearing live testimony."]; see also *Engalla v. Permanente Medical Group, Inc., supra,* 15 Cal.4th at p. 972 [in resolving petitions to compel arbitration, "the trial court sits as a trier of fact, weighing all the affidavits, declarations, and other documentary evidence, as well as oral testimony *received at the court's discretion,* to reach a final determination"; italics added].) Moreover, appellants never requested that the trial court hold an evidentiary hearing.

In sum, appellants failed to demonstrate that their evidence was "'(1) "uncontradicted and unimpeached," and (2) "of such a character and weight as to leave no room for a judicial determination that it was insufficient to support a finding."'" (*Sonic Manufacturing Technologies, Inc. v. AAE Systems, Inc.*, *supra*, 196 Cal.App.4th at p. 466.)[4] We therefore affirm the trial court on this ground.

B. *Whether Appellants Can Compel the PAGA Claim to Arbitration Under the Arbitration Agreement*

Although we conclude that the trial court's order must be affirmed because of a failure of sufficient proof that Maloof signed the arbitration agreement, we alternatively consider the issue on which the parties' briefs primarily focus, whether the PAGA claim can be compelled to arbitration under that agreement.

Here we consider two distinct issues. First, we consider whether the arbitration agreement's provision prohibiting Maloof from bringing a representative action (such as a PAGA claim) in any forum is enforceable. Second, if the outright prohibition is unenforceable, we consider whether Maloof's PAGA claim may nevertheless be sent to arbitration. *Correia v. NB Baker Electric, Inc.* (2019) 32 Cal.App.5th 602 (*Correia*) recently addressed these questions. As we will explain, we agree with the holdings

[4] We do not consider appellants' argument, made for the first time in their reply brief, that the trial court erred in considering "unsworn and unattributed testimony" made by Maloof or her counsel in her response to appellants' sur-reply. (*Nordstrom Com. Cases* (2010) 186 Cal.App.4th 576, 583 ["points raised for the first time in a reply brief on appeal will not be considered, absent good cause for failure to present them earlier"].)

reached in *Correia*. We review the trial court's determination of this legal question de novo. (*Julian v. Glenair, Inc.* (2017) 17 Cal.App.5th 853, 864.)

1. *Enforceability of PAGA Waivers*

Under the PAGA, "an 'aggrieved employee' may bring a civil action personally and on behalf of other current or former employees to recover civil penalties for Labor Code violations. (Lab. Code, § 2699, subd. (a).) Of the civil penalties recovered, 75 percent goes to the Labor and Workforce Development Agency [(Agency)], leaving the remaining 25 percent for the 'aggrieved employees.' (Lab. Code, § 2699, subd. (i).)" (*Arias v. Superior Court* (2009) 46 Cal.4th 969, 980-981, fn. omitted.) "As the [Agency] has 'the initial right to prosecute and collect civil penalties' under the Labor Code," aggrieved employees must first "provide a specified notice to [the Agency] before asserting a PAGA claim." (*Julian v. Glenair, Inc.*, *supra*, 17 Cal.App.5th at p. 865.)

In a PAGA action, "the employee plaintiff represents the same legal right and interest as state labor law enforcement agencies." (*Arias*, *supra*, 46 Cal.4th at p. 986.) Accordingly, such an action "functions as a substitute for an action brought by the government itself" and "'is fundamentally a law enforcement action designed to protect the public and not to benefit private parties.'" (*Ibid.*) "A PAGA representative action is therefore a type of qui tam action. . . . The government entity on whose behalf the plaintiff files suit is always the real party in interest in the suit." (*Iskanian*, *supra*, 59 Cal.4th at p. 382.) Moreover, "a PAGA litigant's status as 'the proxy or agent' of the state [citation] is not merely semantic; it reflects a PAGA litigant's substantive role in enforcing our labor laws on behalf of state law enforcement agencies." (*Id.* at p. 388.)

In *Iskanian*, our Supreme Court held that "an employee's right to bring a PAGA action is unwaivable." (*Iskanian, supra*, 59 Cal.4th at p. 383.) This holding was based on an examination of PAGA's purpose, which "was to augment the limited enforcement capability of the . . . Agency by empowering employees to enforce the Labor Code as representatives of the Agency." (*Ibid.*) As the Court stated, because a PAGA waiver "serves to disable one of the primary mechanisms for enforcing the Labor Code" (*ibid.*), it runs afoul of Civil Code section 1668, which provides that "[a]greements whose object, directly or indirectly, is to exempt [their] parties from violation of the law are against public policy and may not be enforced." (*Iskanian, supra*, at p. 383.) As well, because "PAGA was clearly established for a public reason" (*ibid.*), waivers of PAGA claims violated Civil Code section 3513, which provides that "a law established for a public reason cannot be contravened by a private agreement." (*Iskanian, supra*, at p. 383.)

Iskanian then considered whether its holding prohibiting PAGA waivers was preempted by the Federal Arbitration Act (FAA; 9 U.S.C. § 1 et seq.). (*Iskanian, supra*, 59 Cal.4th at pp. 384-389.) It held that the rule was not preempted because "the FAA aims to ensure an efficient forum for the resolution of *private* disputes, whereas a PAGA action is a dispute between an employer and the state . . . Agency." (*Id.* at p. 384.)

Four years after *Iskanian*, the United States Supreme Court in *Epic* considered the relationship between the FAA and a provision of the National Labor Relations Act (NLRA) guaranteeing workers the right to engage in "concerted activit[y]." (*Epic, supra*, 138 S.Ct. at pp. 1619-1620, citing 29 U.S.C. § 157.) The employees resisting arbitration contended that an arbitration agreement providing for individualized proceedings was

"illegal" because it violated the NLRA provision above, and that such illegality was a ground for a court's refusal to enforce the arbitration agreement. (*Id.* at p. 1622; see 9 U.S.C. § 2 [under FAA, courts may refuse to enforce arbitration agreements "upon such grounds as exist at law or in equity for the revocation of any contract"].) The Court rejected the notion, and in doing so agreed with *Iskanian*, which considered this issue as well. (*Epic*, *supra*, at p. 1619; *Iskanian*, *supra*, 59 Cal.4th at p. 373 ["We thus conclude, in light of the FAA's '"liberal federal policy favoring arbitration"' [citation], that sections 7 and 8 of the NLRA do not represent 'a contrary congressional command' overriding the FAA's mandate."].)

Epic, which focused on the NLRA and not the PAGA, did not abrogate *Iskanian*'s bar on PAGA waivers or, more importantly here, its conclusion that such bar was not preempted by the FAA. This is because "the cause of action at issue in *Epic* differs fundamentally from a PAGA claim," and "*Epic* did not reach the issue regarding whether a [PAGA] claim . . . is governed by the FAA, or consider the implications of a complete ban on a state law enforcement action." (*Correia*, *supra*, 32 Cal.App.5th 602 at pp. 619-620.) Absent such an abrogation, we must follow the California Supreme Court, not federal precedent. (*Id.* at p. 619; *Truly Nolen of America v. Superior Court* (2012) 208 Cal.App.4th 487, 507 ["On federal statutory issues, intermediate appellate courts in California are absolutely bound to follow the decisions of the California Supreme Court, unless the United States Supreme Court has decided the *same* question differently."].)

Accordingly, we apply *Iskanian* and hold that the provision in Maloof's arbitration agreement prohibiting her from bringing any representative action is unenforceable.[5]

2. *Arbitrability of PAGA Claims*

Iskanian did not decide whether a PAGA claim may be arbitrated. (See *Julian v. Glenair, Inc.* (2017) 17 Cal.App.5th 853, 871 ["*Iskanian* did not expressly examine the circumstances under which parties may lawfully agree to subject PAGA claims to arbitration . . . ."].) However, as discussed above, the fact that the state is the real party in interest in a PAGA action compels the conclusion that a PAGA claim may not be arbitrated absent the state's consent. Several cases have recognized this. (*Tanguilig v. Bloomingdale's, Inc.* (2016) 5 Cal.App.5th 665, 677 ["[A] PAGA plaintiff's request for civil penalties on behalf of himself or herself is not subject to arbitration under a private arbitration agreement between the plaintiff and his or her employer. This is because the real party in interest in a PAGA suit, the state, has not agreed to arbitrate the claim."]; *Betancourt v. Prudential Overall Supply* (2017) 9 Cal.App.5th 439, 445-446 ["This is currently a PAGA case, and Prudential is relying on a 2006 predispute arbitration agreement by Betancourt to compel arbitration in this 2015 case brought on behalf of the state. The state is not bound by Betancourt's predispute agreement to arbitrate."]; *Julian v. Glenair, Inc.*, *supra*, 17 Cal.App.5th at p. 872 ["an arbitration agreement executed before an employee meets the statutory requirements for commencing a PAGA action

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[5] We note that, other than using different terms for the parties, the class and representative action waiver provisions in Maloof's arbitration agreement and the one considered in *Iskanian* are identical. (See *Iskanian, supra,* 59 Cal.4th at pp. 360-361.)

does not encompass that action"]; *Correia*, *supra*, 32 Cal.App.5th at p. 622 ["Without the state's consent, a predispute agreement between an employee and an employer cannot be the basis for compelling arbitration of a representative PAGA claim because the state is the owner of the claim and the real party in interest, and the state was not a party to the arbitration agreement."].) Appellants do not contend that the state has consented to arbitration here. Maloof's PAGA claim is therefore not arbitrable here, and we would affirm on this alternative ground.

3. *Appellants' Arguments*

Appellants' arguments are of no merit. Several of appellants' contentions are either directly contradicted by the discussion above (*e.g.*, "California appellate courts have not directly addressed whether the parties to an arbitration agreement may agree to arbitrate representative PAGA claims," Maloof "seeks monetary compensation and penalties which inure solely to her own benefit") or are true but inconsequential (e.g., "The US Supreme Court has never held that the FAA is pre-empted under the *Iskanian* rule"). In addition, appellants' reliance on federal cases for the proposition that *Iskanian*'s bar on PAGA waivers is preempted by the FAA is of no moment, given that we must follow *Iskanian*, not federal lower courts. (See *Truly Nolen of America v. Superior Court*, *supra*, 208 Cal.App.4th at p. 507.) Finally, although appellants attempt to argue that the specific way the trial court applied *Iskanian* below is error even if *Iskanian* remains good law, appellants shed no light on how the trial court might have applied *Iskanian* other than by its direct terms. Appellants accordingly provide no basis for error.

C. *Conclusion*

To prevail, appellants were required to establish that their evidence compelled a finding in its favor as a matter of law. (See *Sonic Manufacturing Technologies, Inc. v. AAE Systems, Inc.*, *supra*, 196 Cal.App.4th at p. 466.) Allos's and Pitpit's declarations do not compel this result because, at a minimum, they failed to demonstrate any personal knowledge that Maloof signed an arbitration agreement. Even if Maloof did sign the arbitration agreement, however, under *Iskanian* and subsequent cases, it would not require her to arbitrate her PAGA claim, the only claim she brings here.

III. DISPOSITION

The order is affirmed. Maloof is awarded her costs on appeal.

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RAPHAEL
J.

We concur:

RAMIREZ
P. J.

MILLER
J.